

A Déjà Vu? The Social Credit System and fajia (Legalism)

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With its resort to data technologies, powerful enforcement machinery, and proclaimed goal of morality enhancement, the Social Credit System (SCS) emerges as a novelty. It captures the imagination of algorithms and a refreshed fear, or hope, of social engineering. The SCS differs from China's existing mode of governance that operates primarily through a formal legal system. Early investigations of the impact of the differences share a preoccupation with technology.¹⁾The SCS' ramifications for privacy and reputation through the medium of datafication have been analysed. See Chen, Yongxi & Cheung, Anne S. Y. (2017) The Transparent Self Under Big Data Profiling: Privacy and Chinese Legislation on the Social Credit System. *The Journal of Comparative Law*, 12(2), 356-377; Dai, Xin. (2018) Toward a Reputation State: The Social Credit System Project of China, [SSRN](#). The philosophical dimensions of those differences await exploration,²⁾The difficulties in separating the role of social credit as a set of (neutral) techniques and as a means of advancing ideological principles are insightfully addressed in Backer, Larry Catá. (2018) Next Generation Law: Data Driven Governance and Accountability Based Regulatory Systems in the West, and Social Credit Regimes in China, [SSRN](#). which this series of online debate timely addresses. While it is certainly beneficial to contrast the SCS to emerging governance mechanisms in the West or principles of civil liberties, it is equally important to connect it to traditional Chinese thought which may have influenced the policy-makers. In view of the tendency of associating the SCS with Confucianism, this blog post concentrates on *fajia* (legalism), a traditional school of political and legal thought that had shaped the mode of governance in imperial China. Given the intricacy of Legalism, discussions here would be unsatisfactorily sketchy, leaving questions to elaborate in a full-length paper. It is nevertheless worth taking this inward and retrospective approach to highlight problems in the SCS that may be overlooked under a futuristic and de-contextualised perspective.

Data technologies do not necessarily revolutionise the regulation of behaviours. They can also facilitate the realisation of aspirations for social control that are encapsulated by Legalism. As a major rival to Confucianism, Legalism advocates radical state control of the society and the primacy of criminal law as a means for upholding autocratic order. In addition to being the ideology in *Qin* (initially the strongest state in the Warring States period [cir. 500 – 221 BC] which became the first unitary dynasty [221 – 207 BC])), Legalism had guided and sustained the operation of legal systems throughout the two-thousand-year-old dynastic era,³⁾See for example Chang, Wejen. (2016) *In Search of The Way: Legal Philosophy of the Classic Chinese Thinkers*. Edinburgh University Press, 473-510. but also has remained a source of inspiration for revolutionists who wished to wield state powers

to forge a social order in line with their respective ideals. Meanwhile, Legalism has been widely criticised in ancient and modern time because of the repressive and manipulative consequences of its measures. If 'dystopian' implies a categorical disregard of individuals' core interests in pursuit of the ideals of a collectivity, Legalists can be regarded as embracing a dystopia, though their thoughts are indigenous. Insofar as there is a close affinity between core features of the SCS and Legalist tenets, as will be analysed below, the system is more like a déjà vu than a futuristic sue genesis.

Expansion of State Interference

The SCS is characterised by subjecting a great variety of conducts to state interference. The malleable concept of 'trustworthiness' is used to assess not only economic conducts (grouped mainly under the category of 'business integrity' of the [2014 SCS Outline](#)), but also the discharges of social commitments, in particular professional activities in the sectors of healthcare, education, research, culture and even NGO operation (grouped under the obscure category of 'societal integrity'). The assessments extend to the fields of morality – such as charity and etiquette in social life – and further cover an individual's online activities, though it is doubtful whether all those activities affect other parties. A substantial part of the enumerated conducts is regulated by autonomous norms that do not derive from the state's will, such as professional ethics and moral principles. The SCS has substituted the autonomous norms for state standards of assessment. Furthermore, it urges different communities to take restrictive measures against their members which are officially rated as "seriously untrustworthy" according to the state standards, despite that the abstract trustworthiness is not the same as the specific quality of financial credibility (*xinyong*), promise-keeping ability (*shouxin*) or integrity (*chengxin*) that is voluntarily evaluated by the communities according to the business, professional or moral context concerned. State standards thus override spontaneous self-regulation.

This heightened extent of state interference is not consistent with Confucianism that separates moral principles and rites (*li*) from executive orders and insists on the supremacy of the former. Instead, it is supported by Legalism which advocates concentrating powers in the hands of the ruler. According to Legalists, the sovereign should put all behaviours of the subjects, including speeches, under surveillance and modulation to achieve the reform goals of making the kingdom wealthy and army strong. The most effective means is *fa*, i.e., rules promulgated by the authorities to prohibit the subjects from doing wrong. *Fa* should override rites, customs and other norms, as the latter are not necessarily compatible with the ruler's goals. This tenet of unifying regulatory powers under *fa* was implemented in *Qin* to the limit allowed by the technology of the time. With datafication and rising computational capacities, the Chinese state of today is better able to detect each citizen's behaviours and set behavioural standards according to changing policy priorities. It can thus reclaim its supervision of individuals which has been weakened due to the marketisation process. Meanwhile, segments of the civil society barely have adequate resources to implement self-regulation norms that are inconsistent with state standards.

Stress on Disproportionate Punishment

Another feature of the SCS is building into the standards of conduct an incentivising mechanism called 'joint punishments and rewards'. In a nutshell, an individual whose conduct is ranked at a given level of trustworthiness may suffer sanctions concurrently imposed by different authorities or social entities, or obtain rewards offered by them, like ripple effects.

However, the mechanism is tilted towards punishment and is often disproportionate. Among the inter-ministerial memorandums about different sectors of social credit, 38 were joint punishment measures and only 5 were joint rewards. Credit China, the national portal of the SCS, publishes monthly releases about the persons subject to joint punishments but rarely provides updates on joint rewards.

Joint punishments, as currently prescribed, distance from the just deserts principle that is repeatedly evoked to justify the SCS. The infliction of punishment is based on the 'trustworthiness' of a targeted infraction, different from the legal liability for the infraction. The trustworthiness assessment virtually reduces infractions of different natures to uni-dimensional and hierarchical positions. This de-contextualised approach affects the relevance and commensuration of punishment. First, relevance is sometimes difficult to see between an infraction in Sector A and the punishments 'jointly' inflicted by an authority regulating Sector B. For instance, under the [Memorandum on Joint Punishments concerning Untrustworthy Persons in Marriage Registration](#), an individual who makes false statements about his or her consanguineous relation with the spouse should be barred from registering his or her enterprise as an 'Authorised Economic Operator' with the customs authority. The relationship is obscure between a business entity's conducts pertaining to the customs code and its legal representative's breach of eugenic policies. Second, severe punishments may apply indiscriminately to infractions of different gravity. For example, ['seriously untrustworthy' people excluded from high-speed trains](#) encompass not only those who have refused to pay overdue debts as ordered by the courts, but also persons in charge of the social security service providers (such as hospitals) which have violated service agreements, and those who have been fined for smoking in rail-cars. It is questionable whether the three kinds of infractions share the same shade of intent or have similarly serious consequences.

The SCS's extraordinary emphasis on punishment is distinct from Confucianism, which prioritises moral education to punishment and generally disapproves excessive penalties. It resonates instead with Legalist tenets. First, while the Legalists hold *fa* as the paramount rules, they equate *fa* with punitive norms. The equation derives from their philosophy that men are essentially evil and that men can be made to act as the ruler wishes only through punishment and reward. The ruler should wield punishments much more than rewards due to the wicked nature of men. Second, Legalism insists that punishments should be numerous and harsh to deter audacious and calculating men from committing less serious offences. The two tenets were followed in different periods of the imperial era, perpetuating the central role of criminal law and imposition of draconian penalties. Under the SCS, the sharing of credit data across sectors and regions would automate the enforcement of punishment, elevating the deterring effects to a speed and scale that the Legalists would aspire to.

‘Convergence of Confucianism and Legalism’

State monopoly of the defining power of ‘trustworthiness’ and heavy reliance on punishment are two essential mechanisms of the Social Credit System. This finding does not negate that the SCS embraces a goal (among others) of morality enhancement. The mechanisms operate despite that goal. Paradoxical as the co-existence seems, it was not new to imperial China. The traditional Chinese political and legal system can be characterised by the ‘convergence of Confucianism and Legalism’.⁴⁾ See generally Zhao, Dingxin. (2015). *The Confucian-Legalist State: A New Theory of Chinese History*. Oxford University Press, 14-15. For instance, ‘making penalties explicit to assist [moral] education’ (*ming xing bi jiao*, #####) was the professed ideology of the founding emperor of *Ming* (1368-1662), but led to the transformation of moral suasion into numerous rigorous laws and extensive deployment of harsh penalties, rendering the rulers increasingly despotic. Today, the instrumentalist mixed use of Confucianism and Legalism can emerge in a different context. The two mechanisms, if unchecked, would have oppressive ramifications with which Chinese historians are familiar. The SCS’s future hinges not so much on how progressive the promoted morality is, but mainly on how the arbitrary definition of trustworthiness can be controlled and what remedies can be sought by citizens subject to joint punishments. It also depends on the extent to which the policy-makers have escaped the culturally ingrained Legalist temptation, i.e., absolutizing state power.

References

- 1. The SCS’ ramifications for privacy and reputation through the medium of datafication have been analysed. See Chen, Yongxi & Cheung, Anne S. Y. (2017) The Transparent Self Under Big Data Profiling: Privacy and Chinese Legislation on the Social Credit System. *The Journal of Comparative Law*, 12(2), 356-377; Dai, Xin. (2018) Toward a Reputation State: The Social Credit System Project of China, SSRN.
- 2. The difficulties in separating the role of social credit as a set of (neutral) techniques and as a means of advancing ideological principles are insightfully addressed in Backer, Larry Catá. (2018) Next Generation Law: Data Driven Governance and Accountability Based Regulatory Systems in the West, and Social Credit Regimes in China, SSRN.
- 3. See for example Chang, Wejen. (2016) *In Search of The Way: Legal Philosophy of the Classic Chinese Thinkers*. Edinburgh University Press, 473-510.
- 4. See generally Zhao, Dingxin. (2015). *The Confucian-Legalist State: A New Theory of Chinese History*. Oxford University Press, 14-15.

